



U.S. Department of Justice

National Security Division

Washington, D.C. 20530

November 2, 2018

Mr. Mark Langer, Clerk
United States Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, NW
Washington, DC 20001

Re: *In re: Abd Al-Rahim Hussein Muhammed Al-Nashiri*, No. 18-1279
Letter under Fed. R. App. P. 28(j)

Dear Mr. Langer:

Petitioner is charged with capital offenses triable by military commission under the Military Commissions Act of 2009. This appeal is a petition for a writ of mandamus to the United States Court of Military Commission Review (USCMCR) challenging orders issued by the military judge who formerly presided over the case on the ground that the judge should have disqualified himself. Petitioner has also moved this Court for a stay of proceedings below pending this Court's disposition of his mandamus petition. Petitioner had previously moved the USCMCR for a stay, but the court had not ruled on the motion when the government filed its opposition to the stay motion yesterday.

We write to advise the Court that today, the USCMCR denied petitioner's stay motion. The USCMCR noted that petitioner should have, and still can, present his disqualification claim to the military commission in the first instance, where "a factual record [can be] created" and the new military judge can rule on the claim. Order at 3, *United States v. Al-Nashiri*, No. 18-002 (USCMCR Nov. 2, 2018). The USCMCR explained that if, after doing so, petitioner "is dissatisfied with the manner in which the new military judge resolves his complaint, [petitioner] is free to seek review in [the USCMCR] through mandamus if appropriate or on direct appeal if there is a conviction." *Id.* The USCMCR further found that petitioner was not likely to prevail on the merits of his mandamus petition in this Court "[g]iven the sparse factual record and a lack of findings and substantive rulings by the military judge and [the USCMCR] for the D.C. Circuit to consider." *Id.* Finally, the USCMCR found that petitioner's arguments regarding irreparable harm did not have merit, in particular because "[a] new military judge has been detailed to his military commission," *id.* at 4, and petitioner is merely speculating "concerning what his lead attorney may or may not do, or the consequences thereof," *id.*

A copy of the USCMCR's order is attached.

Sincerely,

/s/ Joseph F. Palmer

Joseph F. Palmer

Danielle S. Tarin

Counsel for the United States

Attachment



**UNITED STATES
COURT OF MILITARY COMMISSION REVIEW**

United States,)	ORDER
)	
Appellant)	Denying Stay
)	
)	
v.)	
)	
)	
Abd Al Rahim Hussayn)	
Muhammad Al-Nashiri,)	November 2, 2018
)	
Appellee)	CMCR Case No. 18-002

BEFORE:

**BURTON, PRESIDING Judge
SILLIMAN, POLLARD Judges**

Before this Court is Al-Nashiri's motion asking that we "stay further proceedings in this case" pending the Court of Appeals for the District of Columbia Circuit deciding, in essence, an appeal from our denial of Al-Nashiri's request that we disqualify the now former military commission judge, Col. Vance Spath, and vacate a number of his orders.¹ Appellee Mot. 1, 9 (Sept. 13, 2018). Al-Nashiri contends that Judge Spath sought employment as an administrative law judge in the Department of Justice at the same time that he was sitting as a military commission judge who issued orders and made rulings regarding Al-Nashiri's criminal case.² This, Al-Nashiri contends, created a conflict of interest, arguing that the Department of Justice is a party to the litigation below and a Department of Justice attorney is a member of the prosecution. Appellee Reply 4-5 (Sept. 21, 2018); *see also* Appellant Resp. 19

¹ Al-Nashiri filed a petition for a writ of mandamus in the D.C. Circuit seeking the same relief as sought from this Court. He subsequently asked the D.C. Circuit to stay further proceedings in this Court while he pursues relief in the D.C. Circuit.

² Col. Vance Spath, then the military commission judge, abated Al-Nashiri's trial on February 16, 2018. On August 6, 2018, Judge Spath was replaced as the military commission judge by Col. Shelly Schools. This Court vacated the abatement order on October 11, 2018, and directed Al-Nashiri's trial to recommence forthwith.

(Sept. 18, 2018). The conflict, according to Al-Nashiri, requires the *ex post facto* disqualification of Judge Spath and a vacation of “the rulings of Colonel Spath that are the subject of [the government’s interlocutory] appeal” in this Court. Appellee Mot. 9. Al-Nashiri first raised these issues before our Court when he made a motion and, in the alternative sought a writ of mandamus, seeking this relief.

The government opposes Al-Nashiri’s stay motion. It argues that:

- a. The Court does not have the power to hear the motion.
- b. The Court does not have the power to stay the proceedings before the military commission.
- c. Al-Nashiri has not demonstrated that he is entitled to a stay.

The government argues that jurisdiction in Al-Nashiri’s case was returned to the military commission upon the filing of our October 11, 2018 Opinion resolving the government’s interlocutory appeal, except to the extent that we retained jurisdiction to hear and decide motions related to reconsideration by the panel and reconsideration en banc, *see* CMCR Rules of Practice 20(b) and (g) and 29, and in the Opinion regarding issues related to Al-Nashiri’s representation. Assuming, that the government is correct, our rules also allow us to return jurisdiction to this Court to hear the stay motion. Under CMCR Rule of Practice 1, we have the power, [w]ith the exception of Rule 31, [to] suspend any provision of [the Court’s] rules in a particular case and order proceedings as [we] direct[.]” We exercise this power and return jurisdiction to this Court for the limited purpose of hearing and denying the request for a stay of proceedings in our Court and the military commission below. *Cf. Dilley v. Alexander*, 627 F.2d 407, 410 (D.C. Cir. 1980) (“The power of a court to recall its mandate emanates . . . from an inherent power to recall a mandate upon a showing of good cause”).

In his original motion before this Court, Al-Nashiri asserted, that: “On information and belief, Colonel Spath, the military judge whose rulings are the subject of the government’s appeal, has successfully pursued and obtained a position as an administrative law judge (‘ALJ’) at the Executive Office for Immigration Review (EOIR).” He also provided a picture of Judge Spath that, according to Al-Nashiri, was taken in September 2018 at a Department of Justice reception for new Immigration ALJs. Appellee Mot. 5-6. This proffer was the extent of the factual record upon which the disqualification motion rested. We found the record to be inadequately developed and denied Al-Nashiri’s application. We said:

None of appellee’s contentions were raised before the military commission because the case has been abated. Thus, we have no factual

record or findings of the military judge at the trial level to support appellee's allegations for this Court to review.

Upon consideration of appellee's motion, appellant's response, appellee's reply, and the documents submitted, appellee has not shown a "clear and indisputable" right to relief. *Cheney v. U.S. District Court*, 542 U.S. 367, 381 (2004) (internal quotation marks omitted). Appellee has not shown that "a reasonable and informed observer would question the judge's impartiality." *SEC v. Loving Spirit Foundation, Inc.*, 392 F.3d 486, 493 (D.C. Cir. 2004) (internal quotation marks omitted).

CMCR Order 2.

The principal flaw in Al-Nashiri's underlying motion to disqualify Judge Spath is that it should have been made in the military commission where a factual record could have been created and the military judge could have ruled upon any motion to disqualify Judge Spath. We then would have a record and findings to review, rather than a proffer first made in our Court. "Appellate courts are supposed to be courts of review, not first view." *Al Bahlul v. United States*, 840 F.3d 757, 778 (D.C. Cir. 2016) (Millett, Circuit J., concurring), *reh'g denied*, 2016 U.S. App. LEXIS 23446 (Nov. 28, 2016). We are mindful that the proceedings below were abated until October 11, 2018, and at the time that Al-Nashiri sought relief in this Court, he did not have the ability to raise his disqualification concerns before the military commission. That, however, does not empower this Court to hear in the first instance a motion that properly should be made in the trial court. For the same reason, it is with the military judge that Al-Nashiri should raise obtaining discovery to support his motion for disqualification that the government previously refused to supply.

Our disposition of Al-Nashiri's prior motion does not foreclose him from making a motion before the military commission seeking the same relief. If he does and is dissatisfied with the manner in which the new military judge resolves his complaint, Al-Nashiri is free to seek review in this Court through mandamus if appropriate or on direct appeal if there is a conviction.

Turning to Al-Nashiri's arguments regarding an asserted entitlement to a stay of prosecution while he litigates his appeal, we find each wanting.

Given the sparse factual record and a lack of findings and substantive rulings by the military judge and this Court for the D.C. Circuit to consider, we fail to see how Al-Nashiri can "demonstrate a 'clear and indisputable right' to the writ" that he seeks from the Circuit Court disqualifying Judge Spath. *In re al-Nashiri*, 791 F.3d 71, 82 (D.C. Cir. 2015) (quoting *Cheney*, 542 U.S. at 381), *subsequent mandamus proceeding sub nom. In re Al-Nashiri*, 835 F.3d 110 (D.C. Cir. 2016). We, therefore, cannot say that Al-Nashiri is likely to prevail on the merits.

Al-Nashiri advances two arguments regarding irreparable harm. Neither argument has merit.

First, he says that the proceedings below “will continue to be tainted by disqualifying judicial misconduct.” Appellee Mot. 4. Al-Nashiri does not explain this argument, or how he would be irreparably harmed if a stay is not entered while he seeks a writ of mandamus in the D.C. Circuit that would disqualify Judge Spath and vacate some of his rulings. If Al-Nashiri’s case proceeds below, Judge Spath will not preside over it. A new military judge has been detailed to his military commission. If Al-Nashiri moves to disqualify Judge Spath, the new judge will decide whether Judge Spath acted inappropriately, and will enter an order that is consistent with her finding and decision.³ Al-Nashiri is free to ask this Court to review the resolution of his motion. He also is free to ask this Court to address issues upon which we have ruled to the extent that the military judge’s order may implicate them. In short, an orderly and substantive adjudication of Al-Nashiri’s disqualification arguments in the trial and appellate courts not only is the proper way to proceed, it does no harm to Al-Nashiri.

Second, Al-Nashiri raises the possibility that Richard Kammen, his lead attorney and learned counsel, will not comply with our decision affirming the military judge’s order that he remains counsel of record and has a legal and ethical obligation to resume representing Al-Nashiri before the military commission. He assumes Mr. Kammen will continue to litigate the habeas case that he filed in the District Court for the Southern District of Indiana challenging the military judge’s ruling, and that Mr. Kammen will not resume representing Al-Nashiri until that Court rules “on the merits and any appeals to the Seventh Circuit are resolved.” Appellee Mot. 5.⁴ This, Al-Nashiri says, creates a potential conflict between our Court and an Article III court that has temporarily restrained the military judge from compelling Mr. Kammen to travel to a military commission facility in Virginia with respect to his representation of Al-Nashiri. Order, *Kammen v. Mattis*, No.1:17-cv-03951-TWP-DML (Nov. 3, 2017 (Appendix)). Mr. Kammen has not said that he will not obey this Court’s ruling that he remains counsel of record. He has not contested our determination that he has a legal and ethical obligation to resume representing Al-Nashiri. Therefore, we need not assess Al-Nashiri’s speculation concerning what his lead attorney may or may not do, or the consequences thereof.

The pre-trial proceedings involving Al-Nashiri have been disrupted for a year because his defense lawyers would not obey the military judge’s orders to defend their client. This has caused harm to the public and to the government, each of whom, like Al-Nashiri, is entitled to a fair and prompt adjudication of

³ It is also for the new military judge to address Al-Nashiri’s requests for discovery.

⁴ Mr. Kammen did not seek to appeal the military judge’s rulings in this Court, either in his own right or on behalf of Al-Nashiri.

the charges lodged against the accused. In this instance, we do not believe a stay that brings more delay is warranted.

We, therefore, conclude that Al-Nashiri is not entitled to a stay of his prosecution while he seeks a writ of mandamus from the D.C. Circuit directing Judge Spath's disqualification.

We return jurisdiction over this case to the military commission except as indicated in our October 11, 2018 decision.

IT IS HEREBY ORDERED that

Appellee's motion for a stay is **DENIED**.

FOR THE COURT:



Mark Harvey
Clerk of Court, U.S. Court of Military
Commission Review

Appendix

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF INDIANA INDIANAPOLIS DIVISION

RICHARD L. KAMMEN,)	
Petitioner,)	
v.)	
)	
GEN. JAMES N. MATTIS)	
in his official capacity as SECRETARY OF)	
DEFENSE, and)	No.1:17-cv-03951-TWP-DML
)	
HARVEY RISHIKOF,)	
in his official capacity as CONVENING)	
AUTHORITY, DEPARTMENT OF)	
DEFENSE, OFFICE OF MILITARY)	
COMMISSIONS, and)	
)	
COL. VANCE H. SPATH (AIR FORCE), in)	
his official capacity as MILITARY JUDGE,)	
MILITARY COMMISSIONS TRIAL)	
JUDICIARY, DEPARTMENT OF)	
DEFENSE,)	
Respondents.)	

ENTRY FOLLOWING INITIAL HEARING

This matter comes on for an initial hearing on the Petitioner's Petition for Writ of Habeas Corpus and Motion for Declaratory Judgment. ([Filing No. 6.](#)) The Petitioner Richard Kaman appeared in person and with counsel, Robert Hammerle and Jessie A. Cook. The Respondents appeared by Jeffrey Preston, Assistant United States Attorney.

The Petitioner requests relief from the military commission's order of November 1, 2017 purporting to compel him, under threat of contempt, to travel to Virginia and appear there on November 3, 2017 and on November 6, 2017 and, further, asserts that this Court has jurisdiction to enter a preliminary Order to preserve the status quo pending a hearing

on the merits of the Petition for Writ of Habeas Corpus and Motion for Declaratory Judgment.

Having heard the parties' arguments and duly considering the same, the Court now finds that it has jurisdiction of the immediate controversy pursuant to *Hensley v. Municipal Court San Jose-Milpitas Judicial Dist.*, 411 U.S. 345, 351 (1973) and authority to stay the proceedings in order to maintain the status quo pending further hearing [*United States v. United Mine Workers*, 330 U.S. 258, 292-293 (1947)(district court had power to preserve the status quo while determining its own jurisdiction to rule on the merits of declaratory judgment action)].

IT IS THEREFORE ORDERED:

1. That any purported requirement of the military commission hearing the case of *United States v. Al-Nashiri*, or the Military Commission Judge, Colonel Vance Spath, that Mr. Kammen travel to Virginia on November 3, 2017 and/or on November 6, 2017 or on any future date, is stayed pending hearing in this Court.
2. That in the event that a writ of attachment or a warrant issues from a military commission in Guantanamo Bay for Mr. Kammen, the writ of attachment or warrant will be held in abeyance and not served or otherwise executed until this Court holds a hearing on the merits.
3. This Order will issue to the U.S. Marshal for the Southern District of Indiana and be distributed by the U.S. Marshal of this District to the U.S. Marshals in all other districts.
4. That the Government shall file a Response to the Petitioner's Petition for Writ of Habeas Corpus and Motion for Declaratory Judgment on or before **November 24, 2017**. Thereafter, the Petitioner shall have Twenty One (21) days within which to reply to the

Government's Response. Upon completion of briefing, the Court will determine whether an evidentiary hearing is required.

Date: 11/3/2017



TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

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